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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1947.

No. .....

SAMUEL LEONARD BERENBEIM, PETITIONER,

v.

UNITED STATES OF AMERICA.

BEN SCHECHTER, PETITIONER,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

BASIS ON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION.

Jurisdiction exists by virtue of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (Chapter 229, 43 Stat. 936). The Court rendered its judgment on November 5, 1947 (R. 1050, 1051). Petitioners filed their application for extension of time within which to file their petition for rehearing on November 10, 1947, within the time provided by the rules of the Tenth Circuit Court of Appeals. On November 11, 1947, the Circuit Court extended the time for petitioners to file the petition for rehearing

until and including November 27, 1947 (R. 1051). On November 24, 1947, petitioners filed their petition for rehearing (R. 1057). Said petition was denied December 10, 1947 (R. 1059).

STATEMENT OF THE CASE.

Petitioners were indicted for conspiracy under the general conspiracy statute, Sec. 37 of the Criminal Code, 18 U.S.C.A. Sec. 88, to defraud the government and to violate the false claims statute, Sec. 35 of the Criminal Code, 18 U.S.C.A. Sec. 80.

Petitioner Berenbeim was the general agent in Colorado for the Ancient Order of United Workmen, hereinafter called the A.O.U.W. (R. 494). Petitioner Schechter was an insurance solicitor for the A.O.U.W. and for another insurance company (R. 497).

In order to understand the nature of the case, it is necessary to refer to certain provisions of the Soldiers and Sailors Civil Relief Act, hereinafter referred to as the Act (50 U.S.C.A. app. sec. 540 *et seq.)* which are set forth in the footnote hereto.*

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*50 U.S.C.A. appendix, Section 540:

"As used in this article—

"(a) The term 'policy' shall include any contract of life insurance or policy on a life, endowment, or term plan, including any benefit in the nature of life insurance arising out of membership in any fraternal or beneficial association, which does not provide for the payment of any sum less than the face value thereof or for the payment of an additional amount as premiums if the insured engages in the military service of the United States as defined in section 101 of article 1 of this Act (section 511 of this Appendix) or which does not contain any limitation or restriction upon coverage relating to engagement in or pursuit of certain types of activities which a person might be required to engage in by virtue of his being in such military service, and (1) which is in force on a premium-paying basis at the time of application for benefits hereunder, and (2) which was made and a premium paid thereon before the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 (Oct. 6, 1942) or not less than thirty days before the date the insured entered into the military service.

"(c) The term 'insured' shall include any person in the military service of the United States as defined in section 101, article I of this Act [section 511 of this Appendix], whose life is insured under and who is the owner and holder of and has an interest in a policy as above defined."

50 U.S.C.A. App., Sec. 541:

"The benefits and privileges of this article shall apply to any insured, when such insured, or a person designated by him, or, in case the insured

The Act provided for the guarantee by the government of premiums on life insurance policies of members of the armed forces if the policy did not contain a "war-exclusion" clause *(i.e.,* no restriction of coverage of the insured because of military service, and no increase in the premium because of such service), if it was in force on a premium paying basis at the time application was made for such guarantee, and if the contract of insurance was made, and a premium paid thereon not less than thirty days prior to the date the insured entered into military service (50 U.S.C.A. app. sec. 540).

The gist of the indictment (R. 14-53) is that petitioners did conspire to cause the Veterans Administration to guarantee premiums on policies issued by the A.O.U.W. which were not eligible for guarantee under the Act. More specifically, it was charged that petitioners did conspire and agree to fraudulently cause to be issued certain policies by the A.O.U.W. on the lives of certain persons who were about to enter or had entered into active duty with the military service of the United States, so as to make it appear that said policies had been in force on a premium-paying basis at the time of application for benefits under said Act, and had been made and a premium paid thereon not less than thirty days before the date the insured had entered into the

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is outside the continental United States (excluding Alaska and the Panama Canal Zone), a beneficiary, shall make written application for protection under this article, unless the Administrator of Veterans' Affairs in passing upon such application as provided in this article shall find that the policy is not entitled to protection hereunder."

50 U.S.C.A. app., Sec. 546:

"Payment of premiums and interest thereon at the rate specified in section 405 hereof (section 545 of this Appendix) becoming due on a policy while protected under the provisions of this article is guaranteed by the United States, and if the amount so guaranteed is not paid to the insurer prior to the expiration of the period of insurance protection under this article, the amount then due shall be treated by the insurer as a policy loan on such policy, but if at the expiration of said period the cash surrender value is less than the amount then due, the policy shall then cease and terminate and the United States shall pay the insurer the difference between such amount and the cash surrender value. The amount paid by the United States to an insurer on account of applications approved under the provisions of this article, as amended, shall become a debt due to the United States by the insured on whose account payment was made and, notwithstanding any other Act, such amount may be collected either by deduction from any amount due said insured by the United States or as otherwise authorized by law. Oct. 17, 1940, c. 888, Article 406, 54 Stat. 1184, as amended Oct. 6, 1942, c. 581, Article 13, 56 Stat. 775."

military service of the United States, whereas, in fact (the indictment charged), the policies had not been issued nor a premium paid thereon more than thirty days prior to the entry of the insured into military service. The procedure whereby a soldier in the military service obtained the protection of the Act was as follows:

He would send to the Veterans Administration an "Application for Benefits." Copies of these applications appear in the Record. (R. 777, 793). The purpose of this application was to notify the Veterans Administration that the soldier desired to bring his policy under the protection of the Act. Blank forms (known as form 380) were furnished by the Veterans Administration to be filled in by the soldier showing his date of induction, branch of service, effective date of the insurance, the date on which the last premium was paid, the number of the policy, and other pertinent data. The application also contained a statement to the effect that the soldier agreed to any modification of the terms of the policy necessary to bring it under the Act, and an agreement that the "United States shall be protected in the amount of any premiums and interest guaranteed." After the Application for Benefits was received by the Veterans Administration, it sent to the insurance carrier a blank form to be filled in, called "Report by Insurer" (form 381). Copies of these reports appear in the Record (R. 780, 812). The purpose of this report by the insurer was to supply the Veterans Administration with the necessary information about the particular insurance policy so it could be determined whether or not the policy was eligible for protection under the Act. The report by insurer called for the following information, *inter alia*: (1) The effective date of the insurance; (2) the due date of last premium paid; (3) the date on which the contract was made and the first premium paid.

These "reports by insurer" were in every case filled out by the home office of the A. O. U. W. and petitioners had nothing to do with them (R. 118, 505).

The reports submitted by the A.O.U.W. in every case reported the effective date of the insurance, the date on which the contract was made, and the date on which the

first premium was paid as the first day of the month in which the policy was written (See tabulation, pages 33-37 of this brief).

The instant case stems from the circumstance that it had been the consistent and uniform practice of the A.O. U.W. since 1868 to date all of its policies on the first of the month, regardless of the actual date of the application or formal execution (R. 167-168).

For example, if an application for insurance was made on the tenth of a given month, the policy itself would be ante-dated so it would appear therefrom to have been issued on the first of the month (R. 167-168). The government based the prosecution on the fact that *in some cases the application for insurance was made less than thirty days before the entry of the insured into military service, although the record of the A.O.U.W., and the policy itself showed that it was in effect for more than thirty days prior to the entry of the insured into service.* The apparent discrepancy was due to the sixty-eight year old practice of the A.O.U.W. of ante-dating its policies to the first day of the month in which they were issued. The petitioners were advised by the A.O.U.W. in a written communication that this practice had been in force and effect and could be followed in respect to policies issued to persons about to enlist in the military service (R. 100-101).

Policies of the A.O.U.W. did not contain a war-exclusion clause and were therefore eligible for protection under the Act (R. 495) if issued and a premium paid thereon at least thirty days before induction of the soldier into the service. The Record is voluminous, but this is largely due to the fact that the charge of conspiracy is one in which great latitude is allowed, and the evidence, particularly the exhibits, was cumulative. The government called as witnesses sixteen veterans who had obtained insurance from the A.O.U.W. through the solicitation of the petitioner Schechter and other solicitors.

They had made application for this insurance shortly before entering the military service. At the time they made application for insurance they also signed form 380,

the application for benefits under the Act, which was left with the agent with instructions to fill in their date of induction, and other details as to their rank and branch of service (R. 579).

After induction, the soldier would notify the agent of his rank, serial number, branch of service, and date of induction, and this information would be inserted by the agent in the application for benefits, one copy of which was sent to the Veterans Administration, and another to the A.O.U.W. (R. 579). All of this was done under express instructions from the A.O.U.W. (R. 504, 539 and 540).

Some of the soldiers also testified that the solicitor told them that the policy would not cost them anything; (R. 257, 305, and 311) that after the expiration of two years after the war the soldiers could keep the policies or let them lapse, and they would not be obligated to the government for the advance of premiums (R. 257, 311, 320, and 327).

It also appeared from the evidence that in some instance there was no medical examination as required by the rules of the A.O.U.W., but a medical certificate was nevertheless executed by some doctor who did not see the applicant (R. 259, 376). At the conclusion of the government's case, petitioners moved for a verdict of acquittal (R. 485-488) which motion was repeated at the conclusion of all the evidence and denied (R. 726-727).

The petitioners also requested an appropriate instruction on good faith. This instruction was as follows (R. 735):

> "If you believe from the evidence, or if you entertain a reasonable doubt upon the question that the defendants acted in good faith in the honest belief that they were doing what they had a legal right to do, you must acquit such defendants, even though the effect of what the defendants actually did was illegal.

The Court refused such instruction, and the only instruction on good faith given by the Court was, "Also good faith and honest belief is a defense, *if you so find, after you have considered all the evidence*" (R. 759, 760). (Italics added).

REASONS RELIED ON FOR ALLOWANCE OF CERTIORARI.

1. The Circuit Court decided an important question of Federal Law, involving the construction of the Soldiers and Sailors Civil Relief Act (50 U.S.C.A. Appendix, Section 540, *et seq.*) which has not been, but should be, settled by this Court. The lower court held that insurance policies dated more than thirty days prior to a soldier's entry into Military service were not eligible for protection under the Act if they had been physically executed less than 30 days prior to such entry. This is contrary to well-settled principles of statutory construction, and it is important that there be an authoritative construction of the Act.

2. The Circuit Court decided a federal question in a manner in conflict with the applicable decisions of this Court in that it held that the controlling date of a life insurance policy for determining its eligibility for protection under the Act was the date on which it is physically written rather than the date recited in the policy itself. This Court has held in the cases of *Mutual Life Ins. Co. v. Hurni Co.* 263 U. S. 167, and *McMaster v. New York Life Ins. Co.* 183 U. S. 25, that the controlling and effective date of a life insurance policy is not the date on which it is physically executed, but rather the date recited in the policy.

3. The decision of the Circuit Court is in conflict with the decision of another Circuit Court, to-wit; the decision of the Circuit Court for the 2nd Circuit in the case of *Terry v. United States,* 131 F. (2d) 40. The Terry case decided that transactions between a private citizen and a private corporation, previous to a transaction with the government, cannot be made the basis of a charge to defraud the government and that the false claims statute (18 U.S. C.A. 80) did not embrace transactions between private parties. The Circuit Court in the instant case, however, held that it was proper in a prosecution under the false claims statute to introduce evidence intended to show fraud practiced on private individuals prior to, and independent of, any transaction with the government.

4. The Circuit Court has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision for the reason that the Circuit Court sustained a conviction of petitioners for a wrong committed by others, in this—if there was any fraud on the government, or purpose or intent to defraud the government, it was through the implementation of written questionnaires prepared by the Veterans Administration and answered by the A.O.U.W., over which petitioners had no control and in which they took no part, directly or indirectly.

5. The Circuit Court has decided an important question of federal law which has not been, but should be, decided by this Court, to-wit: whether a conviction for a conspiracy to defraud the government (18 U.S.C.A. 88) can be sustained by evidence which shows fraud against private individuals only. Assuming that the evidence produced by the Government showed fraud on the part of petitioners, such fraud was not practiced on the government, but upon private individuals and a private corporation. So petitioners were convicted of a conspiracy to defraud the government by evidence which at the most showed fraud against private parties.

6. The Circuit Court has decided an important matter of federal law in conflict with the decision of another Circuit Court, and of this Court, to-wit: the decision in *United States ex rel Brensilber et al v. Bausch & Lomb Optical Co. et al* 131 F. (2d) 545 (CCA 2), affirmed by this Court by an equally divided Court, 320 U. S. 711; in which case it was held that wrongdoing by private citizens concerning which no misrepresentation has been made to the government, is not covered by the false claims statute. The government relied heavily on evidence that petitioners had caused insurance policies to be written by a fraternal insurance society without submitting the applicants to medical examination. There was no representation to the Veterans Administration that there had been such examinations, and no requirement by the Veterans Administration that there should be medical examinations. So the conviction of petitioners is squarely contrary to the decision in *Bausch & Lomb,* supra.

7. The Circuit Court has decided an important question of federal law which has not, but should be, passed upon by this Court: Whether under the Rules of Criminal Procedure, it is necessary for a defendant tendering an instruction properly stating the law on the matter in issue to also specifically object to an erroneous instruction given by the Court. Petitioners presented a proper instruction as to good faith (#21, R. 735). The trial court refused such instruction and gave an erroneous instruction which placed upon petitioners the burden of proving good faith (R. 759, 760). The Circuit Court declined to consider the matter on the ground that the instruction had not been objected to. The question is thus presented whether under Rule 51 of the Rules of Criminal Procedure it is necessary to object to an erroneous instruction when a correct instruction has been tendered on the issue.

8. The Circuit Court so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision in that the court sustained a conviction on a theory that was expressly rejected by the ruling of the District Court. The trial court instructed the jury that the practice of the A.O.U.W of ante-dating its policies was not evidence of fraud, whereas the Circuit Court held to the contrary, and therefore necessarily sustained a conviction on a theory that was not submitted to the jury.

QUESTIONS PRESENTED.

1. Where a fraternal organization has a long-standing practice of ante-dating its policies to the first of the month, regardless of when the policy is physically issued, and reports to the Veterans Administration that such policies were issued on the first of the month, does such report constitute a false or fraudulent statement under the false claims statute (18 U.S.C.A. Sec. 80)?

2. Assuming such reports to be fraudulent within the meaning of 18 U.S.C.A. 80, could insurance agents who had nothing to do with the making of such reports be held criminally liable for statements contained in them?

3. In a prosecution for a conspiracy to make false statements to the government and for conspiracy to defraud the government, can evidence be introduced to show a fraud against a private citzen only?

4. Where a correct instruction is properly requested on a certain issue, and a manifestly incorrect instruction is given, is it necessary under the Rules of Criminal Procedure for the party tendering the correct instruction to specifically except to the incorrect one given by the Court?

5. Where there is conflict between the rulings of the District Court and the Circuit Court of Appeals on the vital question in the case, can a conviction be sustained? More specifically, can a conviction be sustained by an appellate Court on a theory not submitted to the jury and expressly repudiated by the trial court?

6. If all statements in a report to the government are true at the time it is submitted to a governmental agency for consideration, does the fact that at the time it was signed it contained incorrect statements as of that date make it a false statement within the meaning of 18 U.S.C.A. 80?

7. Does the date on which a contract of insurance is made within the meaning of the Soldiers and Sailors Civil Relief Act (50 U.S.C.A. App. Sec. 540) mean the date recited in the policy, or the date on which the policy is physically executed?

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals Erred:

1. In affirming the conviction of petitioners.

2. In holding that the policies issued by the A.O.U.W. were not entitled to the protection of the Soldiers and Sailors Civil Relief Act.

3. In holding that evidence of petitioners' alleged misrepresentations to prospective soldiers was competent to show fraud against the government.

4. In holding that evidence that petitioners had caused

the A.O.U.W. to issue policies without medical examinations was competent to show fraud against the government.

5. In holding that petitioners were responsible for alleged misrepresentations made by the A.O.U.W. to the government.

6. In holding that there had been fraud or misrepresentation practiced upon the Veterans Administration.

7. In holding that there was sufficient evidence to show a conspiracy.

8. In holding that there was sufficient evidence to connect the petitioner Berenbeim with the alleged conspiracy.

9. In holding that there was not a fatal variance between the conspiracy charged and the conspiracy which the government attempted to prove.

10. In holding that petitioners had not made proper objection to the instruction of the trial court which placed upon petitioners the burden of proving their good faith.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

We incoporate herein the statement of the case contained in the petition for certiorari.

I.

The Circuit Court Decided an Important Question of Federal Law Involving the Construction of the Soldiers and Sailors Civil Relief Act (50 U.S.C.A. App. Sec. 540, et seq.) Which Has Not Been, but Should Be Settled by This Court.

The Circuit court held that in determining eligibility of an insurance policy for protection under the guarantee provisions of the Soldiers and Sailors Civil Relief Act, hereinafter called the "Act," the controlling date of the policy is the date on which it is physically executed, rather than the effective date recited in the policy itself. It is submitted, that this is an important matter of federal law involving the construction of a United States statute which

should be settled by this Court. The point involved here can best be developed by considering a concrete case in the evidence.

The witness Bernard Reiff testified that he was solicited to take an A.O.U.W. policy by petitioner Schechter in February, or the early part of March, 1943 (R. 382).

He signed an application for insurance which was dated February 3, 1943. (Plaintiff's Ex. 53-b, R. 1013). This application was received by the home office of the A.O.U.W March 1, 1943 (R. 1013). The home office reported to the Veterans Administration that it had issued a policy on the life of Reiff, the effective date of which was February 1, 1943 (plaintiff's exhibit 53-f, R. 1024) and that the insurance contract was made and the first premium paid thereon on February 1, 1943 (R. 1024).

Of course, it was physically impossible that the policy could have been written on February 1 and a premium paid on that date because that was before the insured had even signed his application for insurance. Reiff was inducted into the army on April 5 (R. 383) and his application for benefits was dated April 6 (R. 1023). The date of his induction was not less than thirty days after the date of the contract and the date on which the first premium was paid according to the report of the insurer. If the practice of the A.O.U.W. of ante-dating policies had been inaugurated shortly before or at the time of the issuance of these war policies, it might be argued that it was a scheme or trick to bring the policy within the provisions of the law, but there is no question in this case that this practice had been followed as a matter of convenience ever since the inception of the company (R. 167, 168). Indeed, the Court in its charge to the jury stated (R. 753-754):

> "The evidence in this case is that the long-standing custom and practice of the Ancient Order of United Workmen was to date the beneficiary certificates which it issued on the first day of the month in which the application is received, unless the applicant requested otherwise. Under these circumstances the effective date of the insurance for the purpose

of determining its availability for guaranty under the Soldiers and Sailors Civil Relief Act, is the first of the month."

The Court of Appeals, however, took an opposite view. That court said:

> "After the policy had been issued, the defendant who had solicited the insurance filled out or caused to be filled out the application for benefits under the Act previously signed in blank and left with such defendant. One question asked in the application was the due date of the last premium paid on the policy, and the date called for in that question was given as the first day of the month in which the policy was written. Another question was the date on which the next premium would be due and payable, and the date called for in that instance was given as the first day of the month following the month given in response to the previous question. *Relying on these answers, the company gave like answers to like questions in the report which it submitted.* Filled out in that manner, the application and the report in many instances without foundation of fact showed that the policy had been issued on a premium-paying basis and a premium paid thereon more than thirty days prior to the entry of the insured into active duty in the military service. Relying upon the statements made in the applications and in the reports submitted in that manner, the Veterans Administration approved many of the applications, the company accounted to Berenbeim for his commission, Berenbeim made payments to Mankoff and Schechter, and Schechter in turn settled with Marie Stoeffler." (R. 1045-1046). (Italics added.)

The Circuit Court recognized the practice of the A.O. U.W. that had been carried on for many years, nevertheless it held in substance that the report made by the A.O.U.W. "without foundation of fact showed that the policy had been issued on a premium-paying basis and a premium paid thereon more than thirty days prior to the entry of the insured into active duty in the military service." (R. 1045).

This it will be remembered was the very gist of the indictment. It is submitted that the Circuit Court in holding that these policies were not eligible for protection under the Act erred in its construction of the statute involved. The proper construction of the Soldiers and Sailors Civil Relief Act is a matter of vital importance, and it is respectfully submitted that for this reason certiorari should be granted.

II.

The Circuit Court Decided a Federal Question in a Manner in Conflict with the Applicable Decisions of This Court in That It Held That the Controlling Date of a Life Insurance Policy for Determining its Eligibility for Protection Under the Act Was the Date on Which It Is Physically Written Rather than the Date Recited in the Policy Itself.

The Court did not give to the word "date" its ordinary accepted meaning as determined by this Court and other Courts. In *Mutual Life Insurance Company of New York v. Hurni Packing Company,* 263 U. S. 167, 174, this Court held:

> "The word 'date' is used frequently to designate the actual time when an event takes place, but, as applied to written instruments, its primary signification is the time specified therein. Indeed this is the meaning which its derivation (datus given) most naturally suggests. In Bement & Dougherty v. Trenton Locomotive & Co., 32 N.J.L. 513, 515, 516, it is said: 'The primary signification of the word *date,* is not time in the abstract, nor time taken absolutely, but as its derivation plainly indicates, time 'given' or specified, time in some way ascertained and fixed; this is the sense in which the word is commonly used. When we speak of the date of a deed, we do not mean the time when it was actually executed, but the time of its execution, as given or stated in the deed itself. The date on an item, or of a charge in a book account, is not necessarily the time when the article charged was in fact, furnished, but simply the time given

or set down in the account, in connection with such charge."

To the same effect, see *McMaster v. New York Life Ins. Co.*, 183 U. S. 25. This Court has held that " * * * words of statutes * * * should be interpreted where possible in their ordinary everyday sense." *Crane v. Commissioner of Internal Revenue* ..... U. S. .....; 67 S. Ct. 1047, 1051. Certainly the date of an insurance policy is generally understood to be that date expressed in the policy itself, and not the date on which it may have been physically executed. The very purpose of dating written instruments is to settle all questions as to when they were actually and physically made or executed.

The Circuit Court held that there was no foundation of fact in the insurer's report which gave the dates of insurance policies as the dates recited in the policies, rather than the dates on which they were physically issued. It is submitted that such decision is contrary to decisions of this Court above referred to, and certiorari should therefore be granted.

III.

The Decision of the Circuit Court Is in Conflict with the Decision of Another Circuit Court, To-Wit, the Decision of the Circuit Court for the 2nd Circuit in the Case of Terry v. United States, 131 F. (2d) 40.

In the Terry case the Court construed the words "in a matter within the jurisdiction of any agency of the United States" of the false claims statute (18 U.S.C.A. Sec. 80) as excluding from the provisions of that statute false statements made to a loan company by the defendant with the intention that the loan applied for was to be guaranteed by the Federal Housing Authority.

The Circuit Court in that case held that the making of loans was a local business and that federal criminal jurisdiction was not extended by the false claims statute to cover such transactions. Among other things the Court said:

> *"On the other hand, the business of making small loans of the kind which may become insurable under the Act is, and has always been commonly and generally carried on in all the states,* and in the aggregate of transactions it constitutes a very considerable business of local character in each of the states. All of the states have penal laws against the perpetration of fraud in obtaining such loans. As the relevant part of the plan of the Housing Act leaves all of the actual business of making, securing and collecting the loans which may be brought within its purview to be carried on in the several states by private persons (doubtless in large part by the same persons theretofore engaged in that same general business), *it is not self-evident that Congress would choose (even if it could) to extend the federal criminal jurisdiction to all of that business"* (131 F. (2) 40, 43). (Italics ours.)

It must be presumed that Congress in enacting the statute for the protection of policies of men in military service did not intend to interfere with the ordinary operations of insurance companies.

The lower court held in substance and effect that Congress by the Act intended to direct and control the operations of the A.O.U.W. and all other insurance companies. This decision, it is submitted, is in conflict with the decision in the Terry case. On this account a writ of certiorari should be granted. There is this important difference to be noted between the Terry case and the instant case. In the Terry case, the certificate was false, whereas, in the case at bar, the insurer's report reflected the common ordinary course of business of the A.O.U.W. that had been pursued uninterruptedly since 1868.

IV.

The Circuit Court Has so Far Sanctioned a Departure from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of the Supreme Court's Power of Supervision for the Reason That the Circuit Court Sustained a

Conviction of Petitioners for a Wrong Committed by Others.

Petitioners were found guilty of something which the record establishes was done not by them, but by the home office of the A.O.U.W. It should be remembered that the all-important "Report by the Insurer" was prepared and sent to the Veterans Administration not by petitioners, but by the home office of the A.O.U.W. (R. 118).

Any misrepresentations or false claims made to the government were necessarily transmitted by means of this report.

Yet petitioners never saw one single copy of such report (R. 505). So, it is manifest that petitioners are being punished for acts of the officers of the A.O.U.W., of which they were completely unaware and over which they had no control. The Circuit Court seemed to think that the false reports were based on information supplied by petitioners to the A.O.U.W. The Record proves conclusively the opposite. Attached to this brief is a tabulation of data concerning the issuance of policies by the A.O.U.W. which were relied on by the government to prove its charge.

A study of this tabulation shows conclusively that the information given to the Veterans Administration via the insurer's report by the A.O.U.W. *was not based on any information it received from petitioners.* On the contrary, the reports made by the A.O.U.W. were at variance with the information they received from petitioners.

A cursory inspection of this tabulation will show that the home office invariably reported that each policy was issued on the first of the month regardless of the date of the application for insurance, and regardless of the date on which such application was received by the Home Office. Take, for example, the case of Charles Donald Lind, tabulated on page 35 of this brief. His application for insurance was dated February 7. It was not received by the home office until March 1. *But the A.O.U.W. reported to the Veterans Administration that the contract was made and a premium paid thereon February 1.*

If this was a false report, it was soly the responsibility of the A.O.U.W It was admitted at the trial that petitioner had nothing to do with the insurer's report (R. 118).

The Circuit Court ruled that the answers given in the insurer's report as to the effective date of the policy, etc., were based upon answers given in the application for benefits, which were filled out by the petitioners. This is obviously incorrect. The application for benefits, form 380, was not and could not in the nature of things be filled out until the policy was issued (R. 579, 580). Indeed, the Court recognizes that in a previous part of the opinion. It was necessary to insert in the application for benefits the number of the policy. Manifestly, this could not be done until the policy was issued. The date of the policy and the due-date of the premium appeared in the policy. As has already been pointed out. these dates had nothing to do with the date of the application for insurance, but were based upon the practice of dating the policies on the first of the month. The effective date of the policy and the date the premium was paid as it appears in the insurer's report were not based on anything that the petitioners did or could do. The contrary is the truth, *i.e.*, that the effective date of the policy as given in the application for benefits was based upon information from the insurer as set forth in the policy.

The insurer's report to the Veterans Administration was of controlling importance in this case. The undisputed evidence is that the petitioners never even saw a sample form of the insurer's report until the trial (R. 505). This report was required by the Veterans Administration and no policy could be guaranteed without such a report. If there were any false or misleading statements in the insurer's report, they could not possibly be imputed to these petitioners; it was the act and deed of the A.O.U.W., and was wholly beyond the control of the petitioners. But the Circuit Court held petitioners guilty because of statements made by the A.O.U.W, statements of which petitioners were completely unaware, and with which petitioners had nothing whatsoever to do.

It is hardly necessary to say that to convict one for

the wrong done by another is in violation of fundamental justice, and that, therefore, certiorari should be granted on that account.

V.

The Circuit Court Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Decided by This Court, to-wit, Whether a Conviction for a Conspiracy to Defraud the Government (18 U.S.C.A. 88) Can Be Sustained by Evidence Intended to Show Fraud Against Private Individuals Only.

In this case evidence was introduced designed to show that the soldiers insured were in some way victimized by the petitioners. Some of these soldiers testified that the petitioner Schechter represented to them that if they took out these policies the premiums would be guaranteed and they would be under no obligation to the government for any advances that the government made and that the policies would cost them nothing (R. 257, 311, 320, 327). The most that can be argued from this evidence is that petitioner Schechter stated his belief that the government would not attempt to force the collection of any premiums that it had paid.

The petitioners produced in evidence a letter from Senator (then Congressman) Sparkman, a member of the military affairs committee, which indicated that the government would not press the veteran for reimbursement for any premiums advanced (R. 391-392):

"Dear Mr. Gelt:

"I have your letter of January 29 following the discussion that we had in my office on Saturday with reference to the last sentence of Section 406 of the Soldiers and Sailors Civil Relief Act of 1940 as amended in 1942 relating to the debt provisions under which it may be construed that a veteran returning from active service in the armed forces of the United States could find himself in debt to the Government in the event circumstances required

him to drop the commercial insurance protected under the provisions of Article 1 of the Act.

"As you know [when] the House passed the bill it provided that such excess payment would not be a debt against the citizen but that in conference this House provision was stricken and the Senate language was retained.

"I was a member of the conference committee. Representatives of the Veterans Administration appeared before the conference committee and assured us that even though the law should provide that such excess payments would be a debt against the individual, it would not be the policy of the Veterans Administration to harass ex-servicemen by suits or claims. It was upon this assurance that the conferees finally agreed to leave the language in the law.

"The argument is sometimes made that this will enable the Government to withhold some of the pay due the serviceman at time of discharge or to withhold muster-out pay. This is not true. As a matter of fact, under the law the excess payment of commercial insurance policies cannot become a debt against the individual for two years after his discharge from the service, that being the length of time given by him by the statute to refinance his insurance policies. By that time he will have received all pay and all muster-out pay.

"For my part I, of course, expect the Veterans Administration to carry out their assurance. If it should ever become evident that such was not to be done, I feel confident that Congress would quickly amend the law.

Sincerely,

John Sparkman."

The petitioners also received a copy of a letter from the head of the Veterans Administration, which is as follows (R. 1030, 1031):

"Honorable Edwin C. Johnson
United States Senate
Washington, D. C.
My dear Senator Johnson:

"Reference is made to your letter of February 25, 1943, transmitting a letter which you have received from Mr. A. A. Snyder of Denver, Colorado, who invites attention to certain provisions in Article IV of the Soldiers' and Sailors' Civil Relief Act.

"Mr. Snyder questions whether the present law will result in loss to insureds of policies which have been placed under the protection of Article IV because of the inability of such insured to repay, or otherwise finance, the indebtedness placed against their policies within the prescribed two years after separation from active military service and cites a hypothetical case.

"Under the original Soldiers' and Sailors' Civil Relief Act of 1940 failure of an insured to repay premiums guaranteed and interest thereon within one year after separation from military service resulted in the lapse of the policy, notwithstanding that the cash value of the policy might be sufficient to cover the indebtedness. In recognition of the need for greater liberality in this respect the Amendment of Article IV, approved October 6, 1942, extended the time allowed for repayment of premiums to two years after separation from military service and provided for termination of the policy only if premiums then due remained unpaid and if the cash surrender value was less than the amount then due.

"The cash surrender values of policies having guaranteed values increase during the period of protection. Annual dividends are also available as credit to participating policies during the period of protection. Premiums are guaranteed by the United States at an annual rate resulting in a savings to those insured whose policies provide for payment of premiums at a weekly, monthly, quarterly, or semi-an-

nual premium rate. Thus all available credits and discounts are utilized for the benefit of the insured.

"By providing under Section 406 of Article IV, as amended, that the amount guaranteed by the United States and not repaid by the insured be treated by the insurer as a policy loan on the policy, it was believed that a large percentage of insurance protection would be conserved for those policyholders who though unable to repay the full amount of their indebtedness before the period of protection had expired would, by having the indebtedness established as a policy loan, then be able to pay currently due premiums and continue the insurance.

"Your correspondent's letter of February 23, 1943, with enclosure, is returned as requested.

Sincerely yours,

Frank T. Hines,
Administrator."

The fraud denounced in the statute involved, 18 U.S. C.A., Section 88, implies deceit and moral fraud. In *United States v. Brown,* 79 F. (2d) 321, 325 (CCA 2), the Court speaking through Judge L. Hand says:

"The crime was deceit, and we agree with the Eighth Circuit that the liability runs *pari passu* with civil liability. Foshay v. United States, 68 F. (2d) 205, 211 (CCA 8). The Supreme Court has not indeed said so expressly, but that seems to us to be the pre-supposition of Durland v. U. S. 161 U. S. 306, 16 S. Ct. 508, 40 L. Ed. 709, and U. S. v. Comyns, 248 U. S. 349, 39 S. Ct. 98, 63 L. Ed. 287; and we have ourselves so treated it. U. S. v. Rowe, 56 F. (2d) 747 (CCA 2); Pelz v. U. S. 54 F. (2d) 1001 (CCA 2). Cf. Harrison v. U. S. 200 F. 662, 665 (CCA 6). It was therefore necessary for the prosecution to allege and prove utterances about existing facts which were untrue and known to be so."

Evidence was offered to show that the A.O.U.W. had paid out Thirty-three thousand dollars ($33,000) as bene-

fits upon policies guaranteed under the Act (R. 93, 94). It was also shown that a death loss was paid under one of the policies sold by one of the convicted agents (R. 631). At the time the petitioners solicited the prospective soldiers to take insurance, neither they nor anyone else knew whether the soldier would live or die. Manifestly, the question of fraud must be determined in the light of what the parties knew at the time the insurance was taken out. If there was no fraud in cases where the beneficiaries collected under the policy, there could be no fraud in cases where the soldiers survived.

In the report of the Committee on Military affairs of the House of October 6, 1942 (House Report No. 2198), the committee described insurance policies that had no war restriction clause as having "an enhanced and peculiar value" to the dependents of persons in hazardous military service (50 U.S.C.A. App. page 110).

That this evidence of alleged overreaching the soldier was most prejudicial cannot be gainsaid. Any suggestion that a soldier who had served his country had been overreached or taken advantage of was bound to induce strong resentment with an ordinary jury. The cumulative effect of sixteen soldiers testifying along the same line justifies the conclusion that petitioners were convicted, not because of fraud against the government, but because of fraud against the soldier, a charge that was not made and not proved. How can it be reasonably or justly said that a soldier has been defrauded either actually or potentially when he obtains a policy that had an "enhanced and peculiar value" for his dependents?

The representations made by insurance salesmen for the A.O.U.W. to the soldiers to the effect that they could have the benefits of the Act and then permit the policy to lapse after severance from service was not at variance with the Act. This is shown by the legislative history of the Act, as well as the letters from Senator Sparkman and ~~Senator~~ Hines, previously referred to. In the Senate an amendment was made to the definition of the term "policy" which would have made the Act applicable to a contract of life insurance:

"(1) which is in force on a premium-paying basis at the time of application for benefits hereunder, (2) has also been in force on a premium-paying basis for one year or more prior to the date insured entered such active service, or one year or more prior to the date of enactment of this article, as amended, whichever is the later date, and (3) which will have a cash surrender value at the expiration of one year from the due date of the first annual premium guaranteed under the provisions of this Act, equal to or greater than one annual premium required by the policy."

(Senate Report No. 1558, p. 6)

In commenting upon this amendment the Senate Report said (page 8):

"The amendment will restrict protection to an insurance policy issued on a level premium life or endowment plan which has been in force 1 year or more prior to the date of the proposed amendment or the date on which the insured entered on active duty with the military or naval forces, whichever is the later date, and which will have a cash surrender value at the expiration of 1 year from the due date of the first premium guaranteed, equal to or greater than one annual premium required under the policy. This will exclude a policy issued on a term plan or a policy arising out of a fraternal or beneficial association which has no cash surrender value, *and will bar protection of a policy which the insured applied for shortly before entering the military or naval service with the intention of having the Government pay for protection during his period of active service which he does not intend to carry thereafter.*" (Italics added.)

When the bill went to Conference the Senate Amendment was rejected, and the bill finally became law without the Senate Amendment. So the restriction which would have been imposed by the Senate Amendment was rejected and policies "which the insured applied for shortly before entering the military or naval service" were under the protection of the Act. The Conference Report contains the following statement of the Management on the part of the House (Conference Report, House Report No. 2481, p. 5):

"Under the House Bill, a contract of insurance upon which premium has been paid before the date of approval of the act or not less than 30 days before entry into the military service, regardless of the cash value of such policy, might be covered. Under the Senate amendment, the policy must have been in force at least 1 year prior to the date of active service or prior to the date of enactment of the act and must have a cash surrender value of at least one annual premium. This would operate to require a policy to be 3 or 4 years old before it could receive the protection of the act because many policies would not have a cash surrender value equal to one annual premium before the expiration of such time. The conference agreement retains the House provisions."

It was perfectly proper therefore for persons intending to enter the military service to take out this insurance and have the government guarantee the premiums with the express intent of letting the policies lapse after completion of service. Such practice would have been precluded by the Senate Amendment, but this amendment was specifically rejected.

When Congress turned down the Senate amendment which was designed expressly to prevent the taking out of a policy prior to entry into military service with the intention of dropping it upon termination of such service, Congress necessarily put its stamp of approval on that very practice. The opinion of the Circuit Court of Appeals completely ignores this interpretation of the Act which clearly appears from its legislative history.

There was also evidenec introduced over petitioners' objection tending to show that some of them had procured false medical certificates, that is, certificates by a doctor who had never examined the applicant (R. 193, 194). All of these soldiers had been thoroughly examined by army doctors or physicians and passed as fit for military service. Indeed, the indictment so charges (R. 17-18). The Veterans Administration was not concerned with whether these soldiers had medical examination. The A.O.U.W. issued policies up to three thousand dollars without medical examination, and these policies were gauranteed by the Veterans Ad-

ministration (R. 663-664). The Veterans Administration, acting under the authority conferred on it by an Act of Congress, prepared forms 380 and 381. Clearly, these questionnaires were designed to elicit the necessary information which would enable the Veterans Administration to determine whether a policy was eligible for protection. No inquiry was made as to whether there had been a medical examination. This would seem to be conclusive that in the judgment of the Administration such examination was unnecessary in view of the conceded fact that the soldiers had previously been certified as mentally and physically fit by competent army doctors. It would also seem that where one has truthfully answered the questions submitted by the governmental agency, he has performed his duty.

VI.

The Circuit Court Has Decided an Important Matter of Federal Law in Conflict With the Decision of Another Circuit Court, and of This Court, to-wit: The Decision in United States Ex Rel. Brensilber et al. v. Bausch & Lomb Optical Co. et al., 131 F. (2d) 545 (CCA 2) Affirmed by This Court by an Equally Divided Court, in Which Case It Was Held That Wrongdoing by Private Citizens Concerning Which No Misrepresentation Has Been Made to the Government Is Not Covered by the False Claims Statute.

There was no representation to the Veterans Administration as to medical examinations. As has already been pointed out, the forms prepared by the Veterans Administration to be filled in by the insurer did not call for any such information. Even though it be assumed for the sake of argument that there was some wrong committed in not having the soldiers examined, since there was no representation to the Veterans Administration concerning this matter, clearly there was no misrepresentation to or fraud practiced upon the government. This is squarely held in the case of *United States ex rel. Brensilber et al. v. Bausch & Lomb Optical Co. et al.*, 131 F. (2d) 545 (CCA 2), which was a prosecution under the false claims statute. The defendants had obtained a contract from the government by rigging bids and suppressing competition between prospective bidders.

The government would not have entered into the contract if it had been known that there was manipulation among the bidders. The court on page 546 said:

> "We assume, that is, that if the claimant has once procured a contract by fraud, any claims he may thereafter present are 'fraudulent,' whether or not they fall within its terms. That seems to have been the understanding of the Ninth Circuit in Dimmick v. United States, 116 F. 825, and of the Third Circuit in United States ex rel. Marcus v. Hess, 127 F. (2d) 233. Nevertheless, the statute certainly makes fraud of some sort the basis of the liability, and uses the word in its accepted sense of deceit, as appears from the juxtaposition of the three adjectives, 'false,' 'fictitious' and 'fraudulent.' Therefore, although by hypothesis it would be enough that a claimant secured his contract by deceit, deceit is a *sine qua non:* it will not serve that he secured it by any other kind of wrong. The distinction is well illustrated in United States v. Hess, *supra.* The bidders had there all agreed that the defendant, one of their number, should get the contract; he was to put in a bid in an amount agreed to by all, which the others were to top so that their bids would inevitably be rejected. To put in such bids was a deceit, for the bidders intended that the bids should not be accepted, although by the act of bidding they represented that they hoped to succeed. The defendant, being a party to this deceit, which was the means by which he procured his contract, was himself guilty of fraud. In the case at bar, the contracts between Bausch & Lomb and Carl Zeiss of Jena (strictly only the second one is relevant) unlawfully gave Bausch & Lomb an advantage without which, we will assume—though that is not certain—they would not have secured their contracts with the United States. *That was a wrong, but it was not a 'fraud' unless Bausch & Lomb represented at some stage of the negotiations that they had not secured an unlawful monopoly of the market.* Plainly a bidder who bids for a contract makes no representation, express or implied, as to the reasons which have led

> him or enabled him to put in his bid. He does indeed represent that he can perform, but he does not represent that there is an open market, or that his bid is 'normal' or 'reasonable,' or 'competitive.' If he has been guilty of unlawful conduct in eliminating competitors, he can be called to account as Bausch & Lomb have been, but not because by bidding he has said anything about competition.' " (Italics ours.)

The decision of the Circuit Court in the present case is in conflict with the decision of the Circuit Court of the second circuit and of this Court in *United States ex rel. Brensilber et al. v. Bausch & Lomb Optical Co., et al., supra,* which was affirmed by this Court by an equally divided Court (320 U. S. 711) and, therefore, certiorori should be granted.

At the trial of this case it was strongly urged by the government that the application for benefits contained false statements because at the time the prospective soldier signed such application he was not actually in the military service. What actually happened was this: At the time the prospective soldier made application for his insurance, he also signed a blank form for application for benefits under the Act and left it with the insurance solicitor with the understanding that the same was to be completed by the solicitor and forwarded to the Veterans Administration after he had entered the military service. In order to enable the solicitor to fill out the application, the insured notified him after he was inducted and gave him his date of induction, his army serial number, and his branch of service (R. 220, 579). The solicitor would then put this information in the application, together with the number of the policy, its effective date, and the due date of the last premium, and send it to the Veterans Administration. There is no question that at the time the application was received by the Veterans Administration the insured was in the army, and that it was the intention of both the insured and the solicitor not to forward it to the Veterans Administration until after he had been inducted (R. 579). The truth or falsity of the statement contained in the application for benefits must be determined in the light of the facts existing when said document was brought to the attention of the Veterans Administration for official action. See *Reass v. United States,* 99

F. (2d) 752; and *Lightfoot v. State,* 128 Tex. Cr. Rep. 281, 80 S. W. (2d) 984. Before it was transmitted to the Veterans Administration, it was a mere piece of paper.

It could only lead to action by the Administration when it was brought within their cognizance. If the statements contained in the Application for Benefits were true when it was sent to the Veterans Administration, there was no misrepresentation made, and the Court committed prejudicial error in admitting such evidence.

VII.

The Circuit Court Has Decided an Important Question of Federal Law, Which Has Not, But Should Be, Passed Upon by This Court: Whether Under the Rules of Criminal Procedure for the District Courts of the United States, It Is Necessary for a Defendant Tendering An Instruction Properly Stating the Law on the Matter in Issue to Also Specifically Object to a Contrary Erroneous Instruction Given by the Court.

That the issue of good faith was involved in this case is clear. Petitioners solicited insurance for the A.O.U.W. under the instruction of the A.O.U.W. that it was perfectly proper to have the policies ante-dated. This was decided by the legal committee of the A.O.U.W. (R. 100-101). Petitioners requested the following instruction on good faith:

> "If you believe from the evidence, or if you entertain a reasonable doubt upon the question that the defendants acted in good faith in the honest belief that they were doing what they had a legal right to do, you must acquit such defendants, even though the effect of what the defendants actually did was illegal." (Requested Instruction No. 21 (R. 735).)

The Court refused this instruction and advised the jury as follows:

> "Also good faith and honest belief is a defense, *if you so find, after you have considered all the evidence.* The charge or the violation that the defendants are charged with is found in the indictment, which you will have, and you must confine yourself to

> a consideration of those charges and nothing else, because the charge is a conspiracy to attempt to defraud the United States." (R. 759, 760) (Italics added).

That this instruction of the Court is fundamentally wrong is clear. See *United States v. Murdock,* 290 U. S. 389; *McDonald v. United States,* 241 Fed. 793 (CCA-6); *Boatright v. United States,* 105 F. (2d) 737 (CCA-8); *Lambert v. United States,* 101 F. (2d) 960 (CCA-5).

The Circuit Court did not question the validity of the above authorities. But the Court said (R. 1050):

> "But the instruction was not excepted to on that ground, no objection or criticism of that kind was brought to the attention of the trial court either in the form of exception or otherwise. Therefore, the question is not open to review. Rules of Criminal Procedure 30, 18 U.S.C.A. following Section 687."

Rule 51 of the Rules of Criminal Procedure must also be considered, in which it is provided that exceptions are unnecessary, and

> "* * * it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take *or* his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him." (Italics added.)

Since a proper instruction was actually tendered and refused, it would be superfluous to object to the erroneous instruction. All that the rule requires is that the Court's attention must be directed to the error complained of. Furthermore, we maintain that the instruction given violates the basic principles of federal criminal jurisprudence in that the burden of proof is shifted to the accused.

It should also be noted that this instruction (R. 759-760) was a "last minute instruction" considered by this Court in *Bollenbach v. United States,* 326 U. S. 607. In that case, the Court pointed out:

> "Particularly in a criminal trial, the judge's last

word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge." Page 612 of 326 U. S.

VIII.

The Circuit Court So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision in That the Circuit Court Found Petitioners Guilty on a Matter Which Was Not Submitted to the Jury.

We have already quoted the instruction of the District Court as to the practice of the A.O.U.W. in ante-dating policies (*supra*, pp. 12, 13). The trial court took the position that that procedure was proper, whereas the Circuit Court took an absolutely contrary position as appears from the opinion which was hereinbefore quoted. It must be assumed that the jury followed the instruction of the District Court. But the Circuit Court held that the practice of ante-dating the policies by the A.O.U.W. was in conflict with the statute, and that the policies ante-dated by the A.O.U.W. in conformity with its practice did not conform to the statute. The result is that the jury found these petitioners guilty on one theory and the Circuit Court of Appeals on another directly opposite. This Court speaking through Mr. Justice Cardozo in *Shepard v. United States*, 290 U. S. 96, 103, held that "a trial becomes unfair" if evidence is used in an appellate court to sustain a conviction on a different theory from that for which it was used in the trial court. We do not know and cannot tell upon what theory the jury found petitioners guilty, but it is certain that the jury could not have found them guilty because of ante-dating the policies. This was precluded by the instructions of the trial court. Therefore it follows that petitioners were convicted of some other offense, the nature of which is left open to conjecture. It has been held by this Court that where one is charged with one offense and convicted of another there is "sheer denial of due process." See *DeJonge v. State of Oregon*, 299 U. S. 353, 362.

It is respectfully prayed that this Honorable Court may issue a writ of certiorari ordering that this record be certified to this Court for its consideration and review.

Respectfully submitted,

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PHILIP HORNBEIN, JR.,
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APPENDIX.

A tabulation of pertinent data relative to each of the so-called soldier-witnesses who testified for the prosecution. The dates are those appearing on the various documents.

Calvin Frederick Betz.

Wells MacGregor Corliss.

Edgar Dean Burroughs.